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QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

LIST OF PARTIES

The following are the parties to this proceeding:

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Plaintiff-Respondent

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Defendant-Petitioner

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No. 90-584

In The

Supreme Court of the United States

October Term, 1990

SOUTHWEST MARINE, INC.,

Petitioner,

v.

BYRON GIZONI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit[1] reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine, Inc. for summary judgment on the ground that Byron Gizoni ("Gizoni") was a ship repairman covered by the Longshore Act[2] rather than a Jones Act seaman.[3]

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[1] 909 F.2d 385 (9th Cir. 1990).

[2] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter "Longshore Act" or "LHWCA".

[3] The Jones Act, 46 U.S.C. § 688(a).

JURISDICTION

Jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a).

Sections 902(3), 902(3)(G), 902(4), 903(a), 905(a), and 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

STATEMENT OF THE CASE

Respondent Byron Gizoni was a rigging foreman employed by Southwest Marine, Inc. in San Diego, California. He and the riggers under his supervision manned various barges owned by Southwest Marine, which Southwest Marine insists are "floating platforms", not barges (a distinction which is legally irrelevant).

Nonetheless, plaintiff worked substantially aboard these barges which were used to transport ship parts and ship repair equipment around San Diego Harbor. The barges were moved with tugs between the various piers at Southwest Marine, and from the Southwest Marine yard to the Naval Station at 32nd Street. During these moves plaintiff served as a lookout and gave maneuvering signals to the tugboat operator.

On April 6, 1987, one of the Southwest Marine barges was being used to transport a rudder from the shipyard

to a floating drydock where it was to be reinstalled on a U.S. Navy ship. While walking on the deck of the barge, plaintiff's foot broke through a thin wooden sheet which was covering a hole in the deck. In the fall plaintiff suffered disabling leg and back injuries and is unable to work. Because plaintiff was permanently assigned to the Southwest Marine barges he alleged seaman status and sued his employer pursuant to the Jones Act.

Southwest Marine challenges plaintiff's right to claim seaman status and states that he is a harbor worker who is limited to Longshore Act benefits.

However, Section 2(3)(G) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 903, *excludes* "a master or member of a crew of any vessel." Plaintiff is claiming that he is a member of the crew of the barges. Whether he is in fact a seaman or a harbor worker is a factual issue which must be resolved by a jury.

Petitioner Southwest Marine, Inc. brought a motion for summary judgment claiming there were no triable issues of fact, and the motion was granted.

Basically, Southwest Marine was able to persuade the District Court to rule on factual disputes which belong in front of a jury such as seaman status and vessel status. Plaintiff's opposition papers contested and controverted these assertions. The District Court misstated the legal definitions of seaman and vessel and chose to ignore the facts and factual disputes.

SUMMARY OF ARGUMENT

It is Gizoni's position that, pursuant to numerous Supreme Court decisions, seaman status is a factual issue, which must be resolved by a jury. The Supreme Court has broadened the "aid to navigation" requirement to encompass those who contribute to the mission of the vessel, yet defendant wants to narrow it to those who aid the transportation function of the vessel. The Supreme Court has defined vessels as every description of watercraft or other contrivances capable of being used for transportation on water, yet Southwest Marine seeks to exclude work barges in its shipyard.

Southwest Marine wants the district court judges to usurp the jury's power and exclude everyone from Jones Act coverage who is employed in the ship repair industry, regardless of their roles in the operation of vessels.

ARGUMENT

1. RESPONDENT GIZONI IS NOT A COVERED EMPLOYEE UNDER THE LONGSHORE ACT

The Longshore and Harbor Workers' Compensation Act (known as the "Longshore Act"), 33 U.S.C. Sec. 901 *et seq.*, is very specific in its exclusions. 33 U.S.C. Sec. 902 states:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include –

> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraphs (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act;
>
> (E) aquaculture workers;
>
> (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
>
> (G) a master or member of a crew of any vessel; or
>
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;
>
> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

It is clear from this exclusionary language that the Longshore Act excludes secretaries employed by shipyards, security guards employed by shipyards, data processors employed by shipyards, ship repairmen working on recreational vessels under sixty-five feet in length;

ship repairmen working on vessels under eighteen tons net, and ship repairmen who are vessel crew members (regardless of who they are employed by).

The language of 33 U.S.C. Sec. 902(3)(G) preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard. There are no qualifiers. Southwest Marine wants 33 U.S.C. Sec. 902(3)(G) to say "a master or member of a crew of any vessel, unless the vessel is owned by a shipyard and the worker is employed by a shipyard." Unfortunately the Longshore Act does not contain the restrictive language that Southwest Marine wants, so they are asking this Court to change the statute. The Court cannot do this. The Longshore Act does not give shipyards immunity from Jones Act lawsuits. Rather than being restrictive in its language on this issue, the Longshore Act excludes from coverage the master or crew member of *"any"* vessel, without regard to the vessel's ownership or the worker's employment.

Over and over Southwest Marine argues the concept of "Congressional intent." If Congress intended that the Longshore Act cover vessel crewmen engaged in ship repair activity, then why didn't they say that in the Longshore Act? Southwest Marine is virtually saying that Congress didn't know what it was doing when it passed the Longshore Act.

The Longshore Act and the Jones Act are mutually exclusive, and the terms "seaman" and "master or member of a crew of a vessel" are equivalent. *McDermott International, Inc. v. Wilander,* 111 S.Ct. 807, 815 (1991).

Southwest Marine says that Gizoni, as a land-based ship repairman employed on a covered situs, is not entitled to proceed to a jury trial for "reconsideration" of Jones Act status. The word "reconsideration" seems terribly inappropriate here since there has never been an original determination of Mr. Gizoni's status. Basically speaking Southwest Marine is asking the Court to ignore the exclusions in the Longshore Act and extend coverage to Mr. Gizoni without any determination of his status by a trier of fact.

2. ACCORDING TO THE SUPREME COURT, SEAMAN STATUS IS AN ISSUE FOR THE JURY, THEREFORE IT IS NOT A PROPER SUBJECT FOR A SUMMARY JUDGMENT OR ADMINISTRATIVE DETERMINATION

Gianfala v. Texas Company, 350 U.S. 879 (1955); *Senko v. Lacrosse Dredging Corporation,* 352 U.S. 370 (1957); *Grimes v. Raymond Concrete Pile Company,* 356 U.S. 252 (1958); *Butler v. Whiteman,* 356 U.S. 271 (1958).

The Supreme Court has consistently held that seaman status is a jury issue.

Courts have upheld summary judgments and directed verdicts denying seaman status where plaintiffs worked on fixed oil drilling platforms but slept on a tender vessel that serviced the rig. *Golden v. Rowan Companies, Inc.,* 778 F.2d 1022 (5th Cir. 1985); and where an anchor handler was hurt on land before any assignment to a vessel, *Ramos v. Delmar Systems, Inc.,* 750 F.2d 389 (5th Cir. 1985); and where a plaintiff performed longshoremen's work by loading chemicals onto vessels serviced

by his employer, *Balfer v. Mayonne Mud and Chemical Co.*, 762 F.2d 432 (5th Cir. 1985). In these cases the plaintiffs were working on land and had no relationship to a vessel. They are not analogous to the facts in the instant case.

A significant Supreme Court case was *Gianfala v. Texas Company*, 350 U.S. 879 (1955), involving a death action of a worker who had been assigned to a submersible drilling barge and who had been killed while helping unload pipes from an adjacent cargo barge. A jury found the worker to be a crew member. The Fifth Circuit reversed, holding that the status issue was a question of law to be resolved by the judge, that the drilling barge was not in navigation, and that the decedent was on board as a member of a drilling crew and not as a member of a ship's crew. The Supreme Court, without explanation, reversed and remanded the case to the district court with instructions to reinstate the judgment.

The next Supreme Court decision on the issue was *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). The Supreme Court reinstated a state court finding of a seaman status for a handyman on a dredge that had been anchored ashore and used as a stationary earth-moving machine. Senko was a laborer on the dredge who worked an eight-hour shift, ran errands on shore, was paid by the hour, lived at home, drove back and forth each day, and brought his own meals to work. He had no duties connected with moving the dredge and was injured ashore while placing a signal lantern from the dredge in a shack on land. The Court held that "the determination of whether an injured person was a 'member of the crew' is to be left to the finder of fact." *Id.* at 374. Of significance to the Court was testimony regarding Senko's duty "to

maintain the dredge during its anchorage and for its future trips." The Court also found it significant that the plaintiff performed almost all his duties on or on behalf of the dredge and therefore considered him to be "permanently attached to and employed by the dredge as a member of its crew." *Id.* at 372. The Court held this was sufficient evidence to support a jury finding of a crewmember status.

After these decisions, the Supreme Court considered two other cases involving the status issue. *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) involved a pile driver who had helped in completing a "Texas tower," a radar relay installation like a fixed drilling platform. Grimes had lived on the tower and kept its equipment in operating condition while it was being towed out to sea. He had performed strictly piledriving duties after the tower reached its location and was anchored. Several days later, he was injured while returning from a trip from a nearby barge to the tower. The Court of Appeals held that Grimes was not a crew member as a matter of law. The Supreme Court, however, reversed without explanation, citing *Senko*, and *Gianfala*, in holding that there was sufficient evidence to send the status issue to the jury.

The second case, *Butler v. Whiteman*, 356 U.S. 271 (1958), involved a day laborer who had performed odd jobs around his employer's wharf and was killed when he fell off either a barge moored to a wharf or an inoperable tub tied to a barge. The trial court granted the employer's motion for a directed verdict, and the circuit court affirmed, noting that evidence indicated that the tug was not in navigation and the deceased was not a

seaman. The Supreme Court, as in *Grimes*, reversed without explanation and remanded, holding that the status issue was a question for the jury.

The Ninth Circuit has followed the Supreme Court in making seaman status a jury issue in a very significant case known as *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983). Wenzel was a diver employed by Seaward Marine Services. From 1979 to 1982 Seaward had a contract with the U.S. Navy to clean ship hulls. The cleaning process was accomplished by divers going underwater with handheld scrapers and brushes and a submerged cleaning and maintenance platform known as a SCAMP. The SCAMP was a saucer shaped unit 6 feet in diameter and 20 inches deep. It traveled along the ship's hull underwater at 54 feet per minute and could be operated manually by divers. Wenzel, a diver/tender, was assigned to scrape the USS RATHBURNE's underwater sea chest on October 3, 1980, while the SCAMP was *out* of the water. When Wenzel did not surface another diver went underwater and found his body affixed to a sea chest. He had died of asphyxiation. His estate filed a Jones Act claim against Seaward alleging seaman status. Seaward filed a motion for summary judgment arguing that Wenzel was a harbor worker, not a seaman, and the district court granted the motion for summary judgment. The district court's ruling was reversed by the Ninth Circuit, which said that Wenzel's status as a seaman was a close question of fact which had to be determined by the trier of fact.

3. WHETHER GIZONI WAS PERMANENTLY ATTACHED TO A VESSEL OR GROUP OF VESSELS IS A DISPUTED FACTUAL ISSUE WHICH SHOULD GO TO A JURY

The District Court stated that Gizoni was not permanently connected to a vessel. This finding is disputed, and if there is a dispute on this issue, then it is a *factual* dispute which should be resolved by a jury.

In the declaration that Gizoni filed with his opposition to the summary judgment motion he stated:

> "I had worked at Southwest Marine for 3½ years as a rigger and rigging foreman. I worked on the crane barge or the work barges every single day. The third shift riggers, of which I was one, regularly worked on the barges and were responsible for the cleanliness of the barges on a daily basis. I was permanently assigned to the Southwest Marine barges and I worked substantially aboard them. I regularly rode the barges while they were underway within the Southwest Marine yard and also when the barges were towed from Southwest Marine to the Naval Station at 32nd Street. During these moves I handled lines and served as a lookout for the tugboat operator and I gave hand signals to the tugboat operator."

This declaration obviously shows a permanent attachment to the barges. To be a seaman, one need not be attached to one vessel, but to a group of vessels under common ownership and control. This "fleet doctrine" was first discussed in *Norton v. Warner*, 321 U.S. 565, 572 (1944), and further expanded by *Ardoin v. J. Ray McDermont & Co.*, 641 F.2d 277 (5th Cir. 1981); *Robert v. William-McWilliams Co.*, 648 F.2d 255, 261-2 (5th Cir. 1981); and

Waguespark v. Aetna Life & Casualty Co., 795 F.2d 523 (5th Cir. 1986). Since Gizoni was permanently assigned to defendant's barge fleet, he is a seaman.

In *Bullis v. Twentieth Century-Fox Film Corporation*, 474 F.2d 392 (9th Cir. 1973), the Ninth Circuit said on p. 394:

> "The second requirement for seaman status is that there be a more or less permanent connection with the vessel. Significantly the connection may be less permanent, but it cannot be temporary or transitory."

In the instant case, Gizoni's connection to the Southwest Marine barges was hardly temporary or transitory. Working on the barges was a daily part of his job. The Ninth Circuit test in *Bullis* was echoed by the Ninth Circuit in *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (1983). Gizoni worked aboard the Southwest Marine barges everyday. Certainly this is more than a *temporary* or *transitory* connection.

4. THE ISSUE NOW BEFORE THE COURT OF WHETHER EMPLOYEES IN OCCUPATIONS SPECIFICALLY COVERED BY THE LONGSHORE ACT ARE ENTITLED TO HAVE THEIR STATUS AS JONES ACT SEAMAN DETERMINED BY A JURY HAS ALREADY BEEN ADDRESSED BY THE SUPREME COURT

The Outer Continental Shelf Lands Act (OCSLA), 43 USC Sec. 1331, et seq., extends the provisions of the Longshore Act to workers involved in exploring, developing, removing, or transporting natural resources of the outer Continental Shelf. Such workers in these occupations specified by the OCSLA are permitted to bring

Jones Act actions against their employers. This right was described by the U.S. Supreme Court in *Herb's Welding, Inc. v. Gray*, 1985 AMC 1700, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d., note 2 (1985), which says:

> "Offshore oil rigs are of two general sorts: fixed and floating. Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92 Cong., 2d Sess., 393-396, 480-486 (1972), (hereinafter Hearings). Floating structures have been treated as vessels by the lower courts. *E.g. Producers Drilling Co. v. Gray*, 1966 AMC 1260, 1266-67, 361 F.2d 432, 437 (5 Cir. 1966). Workers on them, unlike workers on fixed platforms, see *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 1969 AMC 1082 (1969), enjoy the same remedies as workers on ships. If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters. See generally Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex.L.Rev. 973, 982-992 (1977). Gray is not in a position to take advantage of this line of cases. All, or almost all, the platforms in the field were fixed production platforms rather than floating rigs. (Tr. of Oral Arg. in No. 77-LHCA-1308, before Benefits Review Board, p.12). There has never been any dispute that Gray was injured on a fixed platform, nor any contention that he should be considered to have been on a vessel at the time of his injury. The only question, therefore is whether Gray is limited to state workers' compensation remedies or may also recover under the LHWCA."

Gizoni is seeking Jones Act seaman benefits in the same manner that an oil worker on a floating platform on

the Outer Continental Shelf would seek Jones Act benefits. Like the Supreme Court says, these people "enjoy the same remedies as workers on ships." Southwest Marine is trying to get the Supreme Court to take a position contra to its position in *Herb's Welding*.

5. SOUTHWEST MARINE'S CONTENTION THAT GIZONI IS PRECLUDED FROM BRINGING THIS ACTION BECAUSE OF THE LONGSHORE ACT IS A MISSTATEMENT OF THE LAW

It is Southwest Marine's position that Gizoni, as a harbor worker, is precluded from bringing this action against his employer by the exclusive remedy provisions of the Longshore Act. This dispute is the crux of the whole case. It is Gizoni's contention that he would only be bound by the exclusive remedy provision of the Longshore Act if he were found to be a harbor worker by the trier of fact – and this is something which has never occurred.

Sec. 2(3)(G) of the Longshore Act [33 U.S.C. 092(2)(G)] excludes from coverage "a master or member of crew of any vessel." Therefore, if a jury found Gizoni to be a seaman, he would be ineligible for Longshore Act benefits.

The District Court stated in its decision that Gizoni was not aboard vessels to aid in navigation but rather to "perform work as a ship repairman." This statement is very misleading. Gizoni never repaired his employer's barges – he worked on them to transport parts and do rigging operations that were essential to the loading and unloading of parts that had to be transported. He used

the barges to repair *other* vessels, just as Mr. Wenzel used the scamp to repair Navy ships in *Estate of Wenzel v. Seaward Marine Services, Inc.*, 708 F.2d 1326 (9th Cir. 1983), wherein the Court ruled that Wenzel's seaman status was a jury issue. The District Court's finding in Gizoni is inconsistent with *Wenzel*.

All of Southwest Marine's arguments are based on the unwarranted assumption that Gizoni is a harbor worker covered by the Longshore Act. He contends that he is not and no trier of fact has determined otherwise.

Obviously the exclusive remedy doctrine of the Longshore Act, 33 U.S.C. Sec. 905(b) only applies to workers covered by the Longshore Act. Sec. 905(b) states:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. *If such person was employed to provide ship building, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the*

> *employees of the employer*. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."
>
> (Italicized portions amended in 1984).

This section deals with *third party* negligence actions against vessel owners. Prior to the 1984 amendments all employees *covered* by the Longshore Act could file third party negligence actions against their employers if their employers were the vessel owner and were negligent in their capacity as vessel owner. See *Edmonds v. Compagnie Generale Transatlanlique*, 443 U.S. 256, 61 L.Ed.2d 521, 99 S.Ct. 2753 (1979); *Napoli v. (Transpacific Carriers Corp. & Universal Cargo Carriers, Inc.) Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); and *Allied Towing Corp. v. Tatens*, 580 F. 2d 702 (4th Cir. 1978) (ship repairman case). In 1984 the Longshore Act was amended and shipyard workers covered by the Act lost the right to file third party negligence actions against their vessel owning employers. This has *nothing* to do with seaman status or the Jones Act. Southwest Marine is trying to extend this immunity against third party vessel owner lawsuits by shipyard workers covered by the Longshore Act to Jones Act lawsuits against shipyards that own vessels by seaman employees who are excluded from the Longshore Act. Southwest Marine is trying to fool the courts into thinking that Sec. 905(b) of the Longshore Act cancels out Sec. 902(3)(G) of the Longshore Act. It doesn't. Sec. 905(b) only applies, by its own language, to employees *covered* by the Longshore Act. Sec. 902(3)(G) talks about employees *excluded* from

the Longshore Act. Obviously the immunities in Sec. 905(b) do not apply to employees excluded by Sec. 902(3)(G). Southwest Marine has gone to great lengths to blur these distinctions in paragraph VI of its argument.

Gizoni's right to pursue a Jones Act claim is not affected by his receipt of Longshore Act benefits. See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2d 368 (1962); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948), cert. den., 333 U.S. 876, 68 S.Ct. 905, 92 L.Ed. 1152; *Lawrence v. Norfolk Dredging Co. Inc.*, 194 F. Supp 484 (ED Va 1961); and *Massey v. Williams-McWilliams*, 414 F.2d 675 (5th Cir. 1969).

Southwest Marine's comparison of the Longshore Act to the Federal Employees Compensation Act (5 U.S.C. Sec. 8101 *et seq.*) is unwarranted because the exclusions section of FECA does not exclude vessel crew members.

6. THE EXCLUSIVE REMEDY PROVISION OF THE LONGSHORE ACT WAS NEVER INTENDED TO DENY SEAMAN STATUS TO SHIPYARD WORKERS WHO OPERATED VESSELS OWNED BY THEIR EMPLOYERS

Section 5 of the *Longshore Desk Book*, 1986, published by the U.S. Dept. of Labor, states:

> "The Amendments increase protection for shipbuilding employers (who might be considered temporary vessel owners) by preventing claimants who provide shipbuilding, repairing, or breaking services from employing the dual capacity doctrine and providing that such claimants may not maintain a suit against their employer or any employees of the employer."

This immunity was designed to protect shipyards from claims by their employees regarding accidents on vessels that were in the shipyard for repair where the shipyard was arguably the "owner pro hoc vice." The shipyard is also immune from suits by its own employees for accidents involving new construction vessels undergoing seatrials because such vessels are not "vessels in navigation," *Reynolds v. Ingalls Shipbuilding Division*, 788 F. 2d 264 (5th Cir. 1986).

It is understandable that Congress would want to insulate shipyards from seaman type claims from its employees regarding an employer's relationship with a vessel under construction or a vessel undergoing repairs.

However, it is quite another story when one considers vessels owned outright by a shipyard and operated by a shipyard.

What Southwest Marine is basically saying is that those who work on tugs, barges, and floating cranes owned by a shipyard are not seamen. Obviously those who work on such vessels owned by tugboat companies are seamen.

Southwest Marine is asking the Court to make an artificial distinction between those who work on tugs, barges, and floating cranes owned by a shipyard, and those who work on tugs, barges, and floating cranes owned by a non-shipyard.

Southwest Marine seeks to have seaman status determined by *who* owns the vessel rather than by traditional maritime concepts.

Some shipyards in San Diego contract out for tug, barge, and floating crane services. Other shipyards in San Diego happen to own tugs (National Steel Shipbuilding Co., "MR. ED;" Campbell Industries shipyard, the "GUPPY"), barges, and floating cranes. Does ownership of these vessels by a shipyard destroy their crewmembers' status as seamen?

Suppose a shipyard in San Diego also owns shipyards in Los Angeles and San Francisco, and uses its own tugs and barges to move ship parts between the three ports. Should the workers that crew these tugs and barges be denied seaman status because the vessels are owned by a shipyard?

In the instant case Southwest Marine's workers regularly moved ship parts between the various piers and ships at Southwest Marine, and from Southwest Marine to the 32nd Street Naval Station. Are these people any less seamen than those who would move ship parts from one port to another?

In San Diego NASSCO, Campbell Industries shipyard, and Southwest Marine all own tugboats and these tugboats are used to move barges. Should those who work on the tugs be deemed seamen and those who work on the barges be deemed non-seamen?

In the instant case, a tugboat was always used with the work barges and crane barges that plaintiff labored on.

Can the Court envision a situation where a tug is towing a barge down the Mississippi River and those on the tug are seamen and those on the barge are not?

Tugs and barges work hand in hand. If seaman status is going to be denied to those who work on shipyard barges, then it should be denied to those who work on the shipyard tugs that move those barges. If Southwest Marine's argument is to be accepted, then seaman status would have to be denied to tugboat crews on tugboats owned by shipyards.

There is no language in the Jones Act that would deny seaman status to a crewmember of a vessel owned by a shipyard. There are no Supreme Court or Ninth Circuit decisions that deny seaman status to the crewmember of a vessel because the vessel is owned by a shipyard.

7. CONCLUSION

In its conclusion, Southwest Marine states that Gizoni was a "ship repairman." Gizoni agrees 100% with Southwest Marine on this issue – he was a ship repairman and is willing to so stipulate. Southwest Marine then goes on to say that "ship repairman" is "an occupation specifically covered by the LHWCA." NOT TRUE. Many, many ship repairmen are excluded from coverage under the Longshore Act. Read 33 U.S.C. Sec. 902(3)(B); Sec. 902(3)(F); Sec. 902(3)(G); and Sec.902(3)(H). These sections of the Longshore Act specifically *deny* Longshore Act coverage to ship repairmen on floating ship restaurants; ship repairmen on recreational vessels under sixty-five feet; ship repairmen who are vessel crew members or masters; and ship repairmen on vessels under eighteen tons net. *Lots* of ship repairmen are excluded from the Longshore Act., and Gizoni is one of them. Marine tank

cleaners use barges to pump bilge waste from ships; divers use underwater vessels to clean ship hulls; shipyard riggers use barges to remove, install, and transport ship parts. Many shipyards own their own tugboats, including Southwest Marine (their tugboat is called the "SWMER"). Many vessels are utilized in the repair of ships. To deny seaman status (or jury trials) to crew members on vessels utilized in the ship repair industry would be to defy the statutory language of the Jones Act and the Longshore Act.

The term "land-based maritime worker" just injects a higher level of vagueness into these legal arguments. It is a very misleading term. Obviously many tugboat crewmen, barge crewmen, fishing boat crewmen, and ferry boat crewmen sleep at home and spend each workday on their vessel. The legal definition of "seaman" is not limited to those who live on their vessels.

What does Southwest Marine really want out of this case? In 1987 there was a well publicized crane accident at National Steel & Shipbuilding Company (NASSCO) in San Diego in which six men were killed and six injured. They were being lifted in a manbasket from a barracks barge by a pier crane which dropped the manbasket onto the deck of the USS SACRAMENTO. The barracks barge had just been moved from the floating dry dock to the USS SACRAMENTO by a combination of tugboats owned by NASSCO and PacTow, a commercial towing company. How would Southwest Marine like these tugboat crews handled? Would the crews of the NASSCO tugboats fall under the Longshore Act and the crews of the PacTow tugboats fall under the Jones Act? Or would both the

NASSCO and PacTow tugboat crews fall under the Longshore Act because they were all engaged in ship repair work? Interesting expansion of Longshore Act coverage, isn't it? Hardly one that Congress could have intended or foreseen. Talk about mischief – Southwest Marine is the one who is up to mischief here.

Southwest Marine alludes to Congressional subcommittee testimony given by representatives of the Shipbuilders Council in 1981 when the Longshore Act was being amended. None of that testimony dealt with Jones Act immunity. The 1984 Amendments to the Longshore Act gave shipyards immunity from third party negligence actions by their covered employees, but did not give them immunity from Jones Act claims by their employees.

If the shipyards are seeking such an immunity, they need to address that concern to Congress. The Supreme Court has no power to rewrite the Longshore Act. The Ninth Circuit's decision should be affirmed.

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